In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1014

ARTHUR MEISTER AND DOROTHY MEISTER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The sole question presented by the petition is whether documents belonging to petitioner,[1] which one of his employees had wrongfully taken from him without the knowledge of the government, are admissible against petitioner in a subsequent civil tax proceeding.

1. Petitioner was the sole proprietor of Steelcraft Fluorescent & Stamping Company, which was engaged in the manufacture and sale of fluorescent light fixtures. On December 17, 1964, Morris Abend, who was Steelcraft's office manager and comptroller, met with agents of the Internal Revenue Service and informed them that he possessed documentation which would show that petitioner had deliberately understated his income tax. Abend stated that he was prepared to turn over such documents to the government (Pet. App. 3b).

[1] "Petitioner" refers to Arthur Meister. His wife, Dorothy Meister, is a party solely because she filed joint income tax returns with him for the years at issue.

Pursuing this lead, the agents called at the Abend home on February 15, 1965. At that time, they were informed by Abend's wife that he had died on February 4, 1965. Because of Abend's recent death, the agents decided not to pursue the matter until a later date. They returned on March 11, 1965, and, after showing Mrs. Abend a memorandum of her husband's interview with them, informed her of the purpose of their visit. Mrs. Abend knew nothing of any records which her husband might have possessed, but she consented to the agents' search of a cupboard in which they found several columnar work sheets. These workpapers prepared by Abend purportedly contained his transcriptions of the records of Steelcraft relating to its sales and cash receipts (Pet. App. 2b-5b).

Further inquiries at the Abend home on March 15 and 24, 1965, resulted in the agents' obtaining voluminous bundles of records, including cancelled checks and bound volumes of Steelcraft invoices. Abend had wrongfully removed these records from the Steelcraft premises without the government's knowledge. These records were subsequently returned to Steelcraft pursuant to a court order in a proceeding instituted by petitioner for their recovery in the United States District Court for the District of New Jersey. In that proceeding, petitioner's accountant identified the invoices as Steelcraft's records (Pet. App. 2b-5b, 13b).

Ultimately, the Internal Revenue Service utilized copies of the documents taken from the Abend household, which consisted of Abend's own workpapers and Steelcraft's actual records, for the purpose of verifying the Steelcraft sales and receipts reported by petitioner on his income tax returns for the years 1960 through 1963. Further verification of the sales invoices obtained from the Abend household was obtained from Steelcraft customers by comparing the invoices with customer records (Pet. App. 5b, 14b).

As a result of this audit, the Commissioner of Internal Revenue determined deficiencies in petitioner's income taxes of $271,251.77 for the years 1960-1964, plus civil fraud penalties for the years 1960 through 1963 and a civil negligence penalty for the year 1964. The Tax Court upheld the Commissioner's determination, concluding that petitioner's tax returns for the 1960 through 1963 period were "false and fraudulent with intent to avoid tax" in their omission of the sums of $57,361.13, $93,684.95, $79,043.27 and $90,774.49, for the respective years 1960 through 1963. In addition, the Tax Court found that petitioner had omitted sales and income in the sum of $101,648.13 for 1964, and that this underpayment was due to negligence or intentional disregard of rules and regulations (Pet. App. 19b, 25b).

The court of appeals affirmed. It held that: (1) removal of the Steelcraft records from the Abend household did not violate any right of petitioner since Mrs. Abend had consented to the search of her premises and the removal of the records; (2) the government's utilization of the Steelcraft records in the civil tax case did not violate petitioner's constitutional rights because Abend's wrongful appropriation of the documents had occurred without the government's knowledge or complicity; and (3) the copies of Steelcraft invoices which were admitted into evidence to establish the understatement of income were properly authenticated, both by petitioner's accountant, and by comparison with sales reported on petitioner's tax returns, as well as with customer records (Pet. App. 6b-17b).

2. The court of appeals correctly recognized that this Court's decision in *Burdeau* v. *McDowell*, 256 U.S. 465, long ago established that evidence wrongfully taken by

private individuals without the knowledge or complicity of the government is admissible in a criminal prosecution of the owner of the stolen documents. In *Burdeau*, the Court held that the Fourth Amendment protection against "unlawful searches and seizures" extends only to "governmental action" and does not encompass "the act of individuals in taking the property of another" (256 U.S. at 475).[2] See also *Coolidge* v. *New Hampshire*, 403 U.S. 443, 487-488. These holdings apply *a fortiori* in the present non-criminal context.

The Court in *Burdeau* also rejected the claim that governmental utilization of records appropriated by private individuals would violate the owner's Fifth Amendment rights in a subsequent criminal proceeding. In so holding, the Court observed that the government would have been free to subpoena such documents from third parties in possession of the papers as long as it had had no hand in wrongfully obtaining the documents (see 256 U.S. at 476). As the Court recently reaffirmed in *Couch* v. *United States*, 409 U.S. 322, 328, the Fifth Amendment's prohibition of compelled self-incrimination "does not proscribe incriminating statements elicited from another. * * * It is extortion of information from the accused himself that offends our

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[2]The rule of *Burdeau* has been uniformly applied by the courts of appeals. See, *e.g.*, *United States* v. *McGuire*, 381 F.2d 306 (C.A. 2) (dictum), certiorari denied, 389 U.S. 1053; *United States* v. *Valen*, 479 F.2d 467 (C.A. 3); *United States* v. *Goldberg*, 330 F.2d 30 (C.A. 3), certiorari denied, 377 U.S. 953; *United States* v. *West*, 453 F.2d 1351 (C.A. 3); *United States* v. *Harper*, 458 F.2d 891 (C.A. 7), certiorari denied, 406 U.S. 930; *United States* v. *Echols*, 477 F.2d 37 (C.A. 8), certiorari denied, 414 U.S. 825; *National Labor Relations Board* v. *South Bay Daily Breeze*, 415 F.2d 360 (C.A. 9), certiorari denied, 397 U.S. 915; *United States* v. *Ogden*, 485 F.2d 536 (C.A. 9); *United States* v. *Harding*, 475 F.2d 480 (C.A. 10); *United States* v. *Jones*, 457 F.2d 697 (C.A. 5). See also *People* v. *Horman*, 22 N.Y. 2d 378, 239 N.E. 2d 625, certiorari denied, 393 U.S. 1057, to the same effect.

sense of justice." In *Couch*, the Court relied on *Burdeau* to support its conclusion that possession of documents is required in order for the owner to raise a Fifth Amendment claim to bar their production; it specifically noted that "the Court in *Burdeau* failed to find any impermissible public compulsion on the owner absent his possession" (409 U.S. at 332, n. 14).

In any event, as the court of appeals noted (Pet. App. 12b), the admission of the documents against petitioner here could not have incriminated him because at the time of trial the six-year statute of limitations for criminal prosecution had expired for the years at issue.

3. Contrary to petitioner's argument (Pet. 14-16), *Knoll Associates, Inc.* v. *Federal Trade Commission*, 397 F.2d 530 (C.A. 7), does not conflict with the decision below. There, the court excluded evidence which had been illegally seized by an employee of the defendant corporation's sales representative for the purpose of assisting the government in a Clayton Act proceeding. Unlike the situation here, however, there was evidence of governmental complicity in *Knoll Associates*. Indeed, the Seventh Circuit in *Knoll Associates* specifically distinguished *Burdeau* by stating: "[T]he record [in Burdeau] * * * showed that no official of the government had anything to do with the seizure of petitioner's property or any knowledge thereof until months after it had been taken from him. * * * The facts in this case are the antithesis of those in *Burdeau*" (397 F.2d at (397 F.2d at 535-536, n. 5).

Moreover, the Seventh Circuit's adherence to *Burdeau* is demonstrated by its subsequent holding in *United States* v. *Harper*, 458 F.2d 891, certiorari denied, 406 U.S. 930. There an employee had taken her employer's records with-

out his permission and without the government's knowledge, and had thereafter turned the documents over to the government. On those facts, which closely parallel the present case, the Seventh Circuit upheld the government's use of the records in a criminal tax proceeding, pointing out that the employee had "obtained the records upon her own volition without any contact with or pressure from the government agents" (458 F.2d at 894). Accord, *National Labor Relations Board* v. *South Bay Daily Breeze*, 415 F.2d 360, 363 (C.A. 9), certiorari denied, 397 U.S. 915.

4. The record does not support petitioner's further contention (Pet. 14-22) that Abend was acting in the capacity of a government agent, or that the government had any knowledge of, or complicity in, the original theft. Petitioner's attempt (Pet. 16-17) to ascribe a principal-agent relationship to the government and Abend on the basis of the reward accorded informers by 26 U.S.C. 7623, has no support in the evidence. Nothing in the record indicates that Abend was motivated to obtain the documents by the possibility of reward, or even that he intended to claim a reward for his conduct. See *Coolidge* v. *New Hampshire, supra,* 403 U.S. at 487-488.[3]

5. Finally, petitioner argues (Pet. 22-26) that the decision below is contrary to *Simmons* v. *United States*, 390 U.S. 377. There, a defendant in a criminal case had

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[3]The memorandum of the interview between Abend and the agents (R. 233a-236a) indicates that his motives in going to the authorities included the hope of receiving lenient treatment for his part in assisting petitioner to avoid taxes as well as anger at being compelled to participate in illegal tax evasion over a period of many years. Thus, *Gambino* v. *United States*, 275 U.S. 310, relied upon by petitioner (Pet. 13-15), is inapposite. There, the Court held that an illegal search and seizure made by New York state police solely for the purpose of assisting the federal government violated the Fourth and Fifth Amendments. ("R." refers to the record appendix in the court of appeals.)

unsuccessfully sought to suppress evidence on the basis of a Fourth Amendment claim. However, at the "suppression" hearing he was compelled to acknowledge that the evidence belonged to him, and this testimony was admitted at trial. In reversing his conviction, this Court held that it was improper to force a defendant to choose between surrendering a valid Fourth Amendment claim or waiving his Fifth Amendment privilege. However, *Simmons* has no application to this case because nothing comparable is involved in the present non-criminal proceeding.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.